No. 5618

United States Circuit Court of Appeals For the Ninth Circuit

FEDERAL SURETY COMPANY, a corporation,
Appellant,

vs.

ALBERT LALONDE, R. E. PECK and
WILLIAM POWERS, Appellees.

BRIEF OF APPELLEES

Upon Appeal from the United States District Court for the District of Montana.

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STATEMENT OF THE CASE

Due to the questions raised by appellant on this appeal we believe it advisable to make a more detailed and extended statement of the case than attempted by appellant. This we deem necessary in order that the court may have before it the exact contract between the parties and their situation at the time of trial.

On September 12, 1924, appellees entered into a contract with the State of Montana, through its Highway Commission, to construct 10.68 miles of public highway, known as the Federal Aid Project No. 208-A, and also as Babb-Cardston Road. The contract (R. pp. 74-79) provided, so far as material here, that appellees would do all the work and furnish all the labor, services and materials in the construction of said road; that the construction work upon said road should be completed in accordance with the provisions of the contract, on or before November 1st, 1925, (R. p. 75) but a method was provided in said contract for granting by the State Highway Commission, an extension of time within which to complete the work (R. p. 76).

Pursuant to Section 1790, R. C. M., 1921, the appellant on the 12th day of September, 1924, and without any written application of appellees therefor, other than a request to write the bond (R. p. 212) executed and delivered to the State of Montana appellant's bond (R. pp. 213-215) in which it obligated itself in the sum of $32,459.27 to insure the performance by the appellees of all of the terms and conditions of the contract.

As authorized by the contract, the appellees on October 27th, 1924, entered into a sub-contract with one C. H. Windsor (R. pp. 80-87) whereby Windsor obligated himself to furnish all tools, machinery, implements, work, labor and materials and to assume all the burdens and obligations of the appellees under the contract, and in payment thereof should receive 87½% of the amounts which appellees were to receive under their contract with the State Highway Commission (R. p. 82), and in the event of default appellees were authorized to take over the work, after notice, and complete it and account to Windsor, but, nevertheless should have their 12½% of the amount earned under the contract (R. pp. 84, 85).

It was further provided that Windsor would comply with the Workmen's Compensation Act of the State of Montana (R. p. 85) and that appellees might advance money from time to time which should be deducted out of the earnings of Windsor under his sub-contract (R. p. 82).

This contract was consented to by the State Highway Commission, by its endorsement thereon. For the faithful discharge of the duties of Windsor, the appellant, on October 27th, 1924, executed and delivered to the appellees, its bond in the sum of $28,500.00 (R. pp. 88-92),

and executed by the Federal Surety Company by D. A. Crichton, its attorney in fact (R. p. 92). For premium upon this bond appellant received $852.05 (R. p. 221) of which amount the appellees obligated themselves to pay one-half or $426.02 in their sub-contract with Windsor (R. p. 86). *This is the bond in suit.*

In addition to the premium received by it, the appellant to indemnify itself against loss, received from Windsor a transfer of all of the right, title and interest in and to all tools, equipment and all materials which might be purchased during the process of construction, whether in storage or transportation, and authorized the agent of the appellant to take possession thereof to enforce the security (R. p. 223), and also Windsor agreed that appellant should be subrogated to all of the rights, privileges and properties as of October 27th, 1924, and to all moneys reserved, and that the property and proceeds thereof and all moneys reserved, should be the sole property of the appellant (R. p. 224).

The appellant interpreted the bond, as appears throughout the record, not necessary here to specify, to obligate it for the performance of the Windsor sub-contract.

The bond further provided that in case of default on the part of Windsor, a written statement of facts shall be delivered by registered mail to the appellant at Davenport, Iowa, and in no event later than ten days after the appellees should become aware of such default, and that appellant *shall have the right, at its option, to proceed with the performance of the contract with Windsor*, and shall thereupon immediately be subrogated to all of the rights of the principal and obligee, and as such contract is performed all sums of money payable to Windsor shall

be paid to the appellant or whomever it may procure to perform the contract (R. p. 89).

Windsor commenced the construction of the road under the terms and conditions of his sub-contract but abandoned work thereon on or about the 20th or 21st day of October, 1925, (R. p. 97).

Pursuant to the contract and sub-contract, estimates of the work done by Windsor were made monthly after the work commenced, estimate No. 1 being for the period ending May 20th, 1925; No. 2 for the period ending June 20th, 1925; No. 3 for the period ending July 20th, 1925; No. 4 for the period ending August 20th, 1925, and No. 5 for the period ending September 20th, 1925, (R. pp. 144, 145).

According to these estimates, 1 to 5 inclusive, Windsor had earned $20,601.02, out of which the State paid the appellees $18,540.92, and the State retained for appellees under the contract $2,060.10 (R. pp. 144, 145).

Appellees, under the sub-contract, were indebted and prior to October 29th, 1925, had paid Windsor $16,223.31 (R. p. 92), and under the sub-contract had advanced him for labor and materials in the construction of the road the sum of $3,739.10 (R. p. 93).

Estimate No. 6 for the period ending October 20th, 1925, had not been delivered to appellees at the time Windsor abandoned the contract (R. p. 92), but Windsor had earned under such estimate the sum of $2,856.22 (R. p. 145), out of which the State, on November 18th, 1925, paid to the appellant $2,570.60 and retained $285.62.

Thus, Windsor earned under the contract and sub-contract, estimates 1 to 6 inclusive, $23,457.24 (R. pp. 144-145).

On October 20th, 1925, the State Highway Commission notified appellees and Crichton that Windsor had quit, his laborers stranded in Browning, in a critical condition, and stated that appellees and appellant must take immediate action to pay laborers, and prevent repetition of similar occurrence (R. pp. 123, 227). Of this fact the appellees and Crichton, by wire, notified appellant at Davenport, Iowa, (R. pp. 97, 253).

Appellees further advised appellant that Windsor had been advanced all that he had coming and requested the appellant to take steps to protect them under the bond, appellees' exhibit 5, (R. p. 97). Appellees having received no reply from appellant again wired it on October 22nd, 1925, at its home office, requesting a reply to the former message, and also inquired what the appellant was going to do to protect appellees under the Windsor bond (R. p. 98).

On October 23rd, 1925, by night letter, appellant advised appellees that "matter referred to Crichton." By pre-arrangement, appellees Powers and Lalonde met Crichton at Browning, October 23rd, 1925, (R. p. 98). Upon coming into contact with Crichton, *appellees offered to take over the work under the Windsor contract and complete it, reimbursing themselves for the $3,739.10 which they had advanced to Windsor, and release the Federal Surety Company of that obligation*, and requested Crichton to ascertain from Windsor whether they might use the gravel crusher on the project and the two trucks for emergency, for completing the project (R. pp. 00-100). At first Crichton assured appellees that such course would be satisfactory if it were agreeable to Windsor (R. pp. 100-101).

On the morning of the 24th day of October, 1925, Crichton notified appellees that they could not take over the work, *but that he would take it over and complete it for Windsor on the condition that appellees give appellant an agreement to the effect that appellant might receive all the money from the State Highway Commission theretofore earned by Windsor or that thereafter might be earned by the appellant, and that the appellant would pay appellees their 12½% of each estimate as received* (R. p. 101). Crichton advised appellees that he would prepare the agreement for appellees to sign embodying the features of the understanding (R. p. 101).

After the agreement was reached at Browning, on October 24th, 1925, the Federal Surety Company took over the machinery of Windsor's and put a man in charge thereof (R. p. 232). When the Federal Surety Company took over the work Crichton did not claim, and at the trial did not claim that appellees had in any way failed to perform any provisions of the contract (R. p. 125). His only contention was that the Federal Surety Company had been released from the bond on the sub-contract by reason of appellees paying Windsor $3,739.10.

Pursuant to Crichton's agreement with appellees at Browning, and on October 29th, 1925, he forwarded to appellees exhibit 23 (R. p. 130), a form of letter to be signed by them and sent to the Federal Surety Company, such form of letter authorizing the Highway Commission to turn over all money to be due under the Babb-Cardston project. In the letter Crichton inserted—*"It being understood that you, (Federal Surety Company) are to move on to this work and complete same in lieu of Mr. Windsor, who has defaulted,"* and also the clause to the effect

—"that all parties were standing on their rights." On the same day Crichton wrote appellees exhibit 8, advising appellees of the receipt of authority from appellant to take over the job, and stated that it would reimburse appellees for the amount they advanced at Browning as soon as they gave authority to the Highway Commission to pay over the money. Accordingly, appellees wrote their exhibit 9, October 30th, 1925, embodying substantially paragraphs one and two of appellant's exhibit 23, and appellees' appended paragraph three, providing for the payment to appellees of 12½% of all amounts received by the appellant (R. pp. 106-107). The appellees also signed authority to the State Highway Commission to turn over to the Federal Surety Company the moneys mentioned, appellees' exhibit 11, dated October 30th, 1926, which was prepared by Crichton (R. p. 109), and appellees forwarded both of these instruments to their attorneys to be delivered to Crichton.

Exhibit No. 9 was produced in court by appellant and it was stipulated that exhibit 11 had been received in the office of the State Highway Commission (R. p. 108).

The consideration for the change shown by appellees' exhibit 9, (R. p. 106) was the authorization by the appellees to the State Highway Commission to turn over the earnings under estimate No. 6, and all subsequent earnings, to the Federal Surety Company, and to allow them to stand upon the sub-contract and bond thereon, and the promise of the Federal Surety Company to pay appellees 12½% of the amount earned by Windsor under estimate No. 6, and amount to be earned by said Federal Surety Company, in the completion of the work.

As above pointed out, *Crichton understood that the Fed-*

eral Surety Company was taking over the work for Windsor, and embodied such statement not only in the form of letter submitted by him to the appellees, appellant's exhibit 23 (R. p. 130), *but also in the form of letter to the State Highway Commission, appellees' exhibit 11* (R. p. 109).

Thereafter, Crichton stated to Mr. Whipps of the State Highway Commission, and to the Industrial Accident Bureau, that the Federal Surety Company was taking over the work under the sub-contract bond, that is, the Windsor bond (R. pp. 138, 140), and stated to E. J. Dorreen, Resident Engineer on the Babb-Cardston work, that the work had been taken over for Windsor on account of his default (R. p. 144).

Before June 14th, 1926, the Federal Surety Company received from the State of Montana the non-Indian portion of estimate No. 7 (R. p. 145), and before June 28th, 1926, received the Indian portion of estimate No. 7 (R. p. 146).

On June 16th, 1926, appellees' exhibit 17, (R. p. 117) appellees demanded of the Federal Surety Company 12½% out of the May estimate, to which there was no response, and they again under date of June 25th, 1925, exhibit 15, (R. p. 115) demanded of the Federal Surety Company the amount due them on the May estimate, and also the amount due them on the June estimate. On the back of that letter was written Crichton's reply, exhibit 16, (R. p. 116), in which he advises appellees that the Home Office would likely either send their check to Crichton or authorize him to draw for the amount, and states that the amount should reach appellees the coming week. That refers to estimate No. 7, of May 20th, 1926,

and again on June 28th, 1926, exhibit 18, Crichton expected a check from the Home Office for appellees early that week (R. p. 118).

Under date of July 1st, 1926, appellees' exhibit 19, (R. p. 119), Crichton wrote appellees that on that date he had received a telegram from the Federal Surety Company as follows: *"Taylor is emphatic and desires you pay no material bills or Lalonde, Peck and Powers percentage until job completed. Our bond protects Lalonde, Peck & Powers percentage, and we will not pay that until final,"* and Crichton further advised that such telegram stopped him from sending check for their 12½% which he had intended to do. But Crichton also advised appellees in his handwritten letter, undated, exhibit 20, (R. p. 120), *that he had authority from the Federal Surety Company to pay them 12½% on last estimate.* Apparently the word "final" in exhibit 19 had reference to final estimate.

Various demands were made upon appellant for the payment of the amount due without avail (R. pp. 199, 201, 202, 205, 206, 207, 208, 209).

The appellant presented to the State Highway Commission, claims verified by Crichton as General Agent, for estimates Numbered 6 to 11, inclusive, and also presented claim for estimate No. 12, verified by Crichton as State Agent, on November 15, 1926, in which last mentioned claim all of the ten percent retained by the State Highway Commission for the time Windsor was performing the sub-contract, as well as thereafter, was included (R. pp. 157-195).

Except the amount of money paid into the District Court of Lewis and Clark County (R. p. 152), the appellant received all that was earned upon estimate No. 6,

and thereafter, but paid appellees only $321.23, on June 8th, 1925, (R. p. 121).

From the foregoing it is obvious that the change made by the appellant and the appellees, and evidenced by the letter of October 30th, 1925, was, in effect a new contract, between the parties, and that by reason of appellant's direct promise to pay 12½%, the Federal Surety Company became liable for the payment, both under the bond and the contract.

Until the answer was filed in this case, neither the Home Office of the appellant, nor Crichton ever intimated to anybody that the Federal Surety Company took over the work for the appellees. On the contrary, all of Crichton's statements and letters relating to that matter were to the effect that the work had been taken over on account of Windsor's default, and Crichton admitted on the witness stand that appellees were not in default in the performance of the contract at the time the work was taken over.

In support of its counter-claim the appellant offered the testimony of Crichton to the effect that he had supervised the completion of the work; went upon the work about once in every two weeks; received bills for supplies and labor; made checks therefor, and over the objection of appellees, stated that all the labor for which checks were issued, and all the supplies, materials, parts and rentals were necessary on the job (R. pp. 233-238). Without even so much as attempting to identify, by Crichton, the checks and orders used in connection with payments for labor, supplies, materials, etc., the appellant called to the witness stand its Auditor, S. M. Toole, he claiming to have gone over the records of the office of the D. A.

Crichton Company and of the Federal Surety Company, at Davenport, Iowa, and made an audit and then, over the objection of the appellees, was permitted to testify as to what was shown as a total of checks and orders in appellees' exhibits No. 49 to 63, inclusive. Upon these he concluded that the appellant had expended for labor, materials, insurance, employment agent's fees, and whatnots, the sum of about $77,340.81, in the construction of the Babb-Cardston Road, after the appellant took over the work (R. pp. 260-271). No evidence was offered by appellant to show the reasonable value of the labor, materials and supplies which went into the work.

Mr. Toole was not required to furnish the result of his audit, as is contemplated by Section 10516, subdivision 5, R. C. M. 1921, but was requested merely to give totals of various checks and orders, and except in a few instances, had no personal knowledge of the items for which said checks and orders were given.

Appellees' proof (R. pp. 281-296) that the reasonable value of all the labor, services and materials necessary to complete the work after the appellant took it over was the sum of $32,611.91 (R. p. 287), and in part this testimony was based upon what the estimate showed as the amount of yardage, and quantity of materials, etc., used in the work, and the estimates corroborated in every material way the testimony of appellees upon that point (R. pp. 288-296). The appellees further proved, based upon the reasonable value of such labor, services and all other items which went into the construction, the work done by the Federal Surety Company under the sub-contract, including estimate No. 6, and the 10% withheld on the

first six estimates, should reasonably have been $14,263.97 (R. p. 296).

OBJECT OF THE ACTION.

With the above statement of the case in mind, the object of the action here under consideration becomes apparent. Appellees sought to recover the amount of money advanced by appellees to Windsor, to-wit, $3,739.10 (R. p. 93); the 12½% difference to be retained by appellees from all moneys received from the State, to-wit, $6,045.51, less a credit of $321.34 (R. pp. 6, 121); and the sum of $468.33 assessment paid under the requirements of the State Workmen's Compensation Act (R. pp. 7, 111). The basis for the action is the contract between Windsor and appellees, the performance of which was insured by the bond of October 27, 1924, and the subsequent agreement between appellant and appellees evidenced by the correspondence appearing in the record and by the acts of the parties (R. pp. 101, 106). The District Court sustained the theory of appellees and rendered judgment for the full amount demanded, with interest. From that judgment this appeal is taken.

ARGUMENT.

In the presentation of argument on behalf of appellees we shall follow as closely as possible the order used by appellant in its brief.

At the outset it must be borne in mind that the bond here must be construed most strongly against the surety.

Whittaker v. U. S. F. & G. Co., 300 Fed. 129;
Lincoln County v. Bridge Co., 231 Fed. 468;
State v. American Surety Co., (Mont.) 255 Pac. 1063;

Nat. Surety Co. v. Lincoln County, 238 Fed. 705; 12 A. L. R. 382.

All ambiguities must be resolved in favor of appellees;

Blankenship v. Decker, 34 Mont. 292;
Weir v. Ryan, 68 Mont. 336.

The bond must be construed in accordance with the law of Montana.

Capital Finance Corp. v. Metropolitan Ins Co. (Mont.) 243 Pac. 1061;
Bank v. Fuqua, 11 Mont. 285.

1. The Appellant Having Expended More Than the Penalty of Its Bond in Completing the Work, Respondents Cannot Recover in This Action.

In this portion of our brief we shall assume, for the purpose of argument only, that competent evidence was introduced on behalf of appellant showing an expenditure by it in completing the road in excess of the penalty of the bond.

As we have heretofore seen in our analysis of the evidence there never was a claim made that appellees were in default or that they refused to proceed. In appellant's brief the statement is made (p. 14) that:

"Prior to appellant's taking over the work, after Windsor had ceased work, *respondents refused to complete the project except as agent for the Federal Surety Company.*"

There is absolutely no evidence in the record to substantiate such assertion. Respondents *offered* to move their outfit on to the project and complete it for the Federal Surety Company (R. p. 99). They agreed to work out all advances to Windsor (R. p. 99), and to pay to Windsor all profit made on the job (R. p. 100). But

Crichton advised that he "could not turn the work over" to respondents, and that "he would take over the work and complete it for Windsor." (R. p. 101).

That Crichton as general agent for appellant did "take over the work and complete it for Windsor" is not and cannot be controverted here. His actions and letters speak for themselves (R. pp. 101, 104, 109, 130, 138, 141, 144).

By taking over the work for Windsor appellant assumed all the responsibilities of Windsor.

Ausplund v. Aetna Indemnity Co. (Ore.) 81 Pac. 577;
American B. Co. v. Regents, (Ida.) 81 Pac. 604;
Rohde v. Biggs, (Mich.) 66 N. W. 331;
First Natl. Bank v. District, (Nebr.) 110 N. W. 349;
State v. Cornwall, (Ore.) 201 Pac. 1072;
Watterson v. Owens Canal Co., (Cal.) 143 Pac. 90;
Hughes v. Gibson, (Colo.) 62 Pac. 1037.

It was perfectly competent for the parties to agree that appellant might substitute itself for Windsor. In fact they could have substituted a third person.

13 C. J. 590;
Moon v. H. M. Hocker Co., 101 Ill. App. 177;
Mogulewsky v. Rohrig, 93 N. Y. S. 590;
Minder v. Brustuen, (S. D.) 127 N. W. 546.

The liabilities for which respondent became responsible by assuming the performance of Windsor's contract (Ausplund v. Aetna Indemnity Co. supra) are found in the original contract between appellees and the State (R. p. 74), the sub-contract between Windsor and appellees, (R. p. 80), the bond on the sub-contract (R. p. 88), and the additional agreement between the appellant and appellees evidenced by the letter of October 30, 1925. (R.

p. 106). These instruments are the basis of the action herein, (R. pp. 2-6), and must be construed together.

Price v. Garland, (N. M.) 6 Pac. 472;
U. S. F. & G. Co. v. Robert Grace Co., 263 Fed. 283;
Francis Bros. v. Boiler Co. 109 Fed. 838;
Watson v. O'Neill, 14 Mont. 197;
U. S. Natl. Bank v. Chappell, 71 Mont. 553;
Gary Hay and Grain Co. v. F. & D. Co., 255 Pac. 722;
Natl. Surety Co. v. Lincoln County, 238 Fed 705;
9 C. J. 36.

There was of course ample consideration for the agreement evidenced by the letter of October 30, 1925. Appellees gave up their right to take over the work. They permitted the money to be paid directly to appellant. They waived their right to deduct from estimate No. 6, advances made to Windsor. In any event, the burden was upon appellant to show no consideration and this it did not do.

Farmers State Bank v. Probst, (Mont.) 263 Pac. 693.

The obvious intention of the parties, gathered from the instruments themselves, and from appellant's acts and letters, was that appellant assumed all of Windsor's responsibilities, and that intention is binding herein.

Blankenship v. Decker, 34 Mont. 292;
Inman Mfg. Co. v. American Cereal Co., (Ia.) 110 N. W. 287.

Such was the construction placed upon the contracts by the parties themselves. Thus Crichton agreed to pay the 12½% due appellees, (R. p. 101), and that was the understanding of appellees (R. p. 107). On June 8, 1926, Crichton sent the money due on one estimate (R. pp. 113,

114), and advised that additional money would soon be forthcoming (R. p. 116), and again on June 28, 1926, (R. p. 118). On July 1, 1926, (R. p. 119) Crichton wrote of the receipt of a telegram from appellant stating: "Mr. Taylor is emphatic and desires you to pay no material bills, *or Lalonde, Peck & Powers' percentage until job is complete. Our bond protects Lalonde, Peck and Powers percent and we will not pay that until final.*"

Again Crichton wrote, (R. p. 120): *"Have authority from Federal to pay you 12½% on last estimate."*

Such construction is binding upon appellant herein.

Butte Water Co. v. Butte, 48 Mont. 386;
Knapp v. Andrus, 56 Mont. 37;
Nat. Bank v. Ingle, 53 Mont. 414;
Berne v. Stevens, 67 Mont. 254;
Ferry & Co. v. Forquer, 61 Mont. 336;
6 Cal. Jur. p. 304;
U. S. Natl. Bank v. Chappell, 71 Mont. 553.

Further, having for any purpose taken over the Windsor contract and received the benefits thereof, appellant cannot refuse to bear the burdens.

Stone-Ordean-Wells v. Anderson, 212 Pac. 853;
Hills v. Johnson, 52 Mont. 65;
McConnell v. Blackley, 214 Pac. 64;
6 Cal. Jur. p. 60.

The original contract and sub-contract required Windsor to (1) complete the project; (2) pay appellees 12½% of the money received; (3) repay all advances; (4) pay all assessments under the Workmen's Compensation Act. Such then are the responsibilities assumed by appellant. By the subsequent arrangement between appellant and appellees a different method was devised and agreed to for the payment of the 12½%. Such arrangement created no new obligation but crystallized the agreement be-

tween the parties and evidenced, beyond question, the intention of the parties. From the responsibilities thus assumed appellant cannot escape upon any theory. There is nothing in the two cases cited by appellant on page 20 of its brief which militates against this conclusion. Such authorities merely hold that a surety is not bound beyond the terms of its contract. With such statement we do not disagree. But when a surety, either corporate or individual, in pursuance of the terms of an understanding, assumes the performance of the principal's contract, such surety, by being subrogated to the rights of the principal thereunder, must necessarily become subject to all his liabilities.

Ausplund v. Aetna Indm. Co. (Ore.) 81 Pac. 577.

2. Was Any Competent Evidence Introduced Showing the Expenditure of Any Sum by Appellant?

In the previous section of this brief we assumed for the purpose of argument that competent evidence was introduced showing the expenditure of $76,531.87, and a deficit of appellant in the amount of $29,367.75 (Appellant's brief p. 19).

From the argument made by appellant it is evident that the whole basis of its contentions upon this appeal is the evidence introduced which appellant claims shows such expenditure and such deficit.

This evidence appears in the testimony of Crichton (R. pp. 234-244) and S. M. Toole (R. pp. 256-279). Crichton testified substantially as follows: That he paid for labor, materials and supplies on the job (R. pp. 234-235). That about a thousand checks were issued. That he paid the prevailing price in every instance (R. p. 237). That

he assisted Toole in making an audit of the books and checks (R. p. 238). That so far as he knows everything purchased went into the job (R. p. 243). That the various things purchased were necessary (R. p. 244).

No attempt was made during this examination to identify a single check, order or book or to show what had been paid out by appellant.

Toole testified as follows:

That he made an audit of the books and records of appellant in connection with the Windsor contract (R. p. 257). That in making the audit it was necessary for him to inspect more than a thousand checks and other records (R. p. 259). That as to labor and material his audit shows $38,583.77, (R. p. 260); supplies $19,945.76, (R. p. 261); materials, $1,423.77, (R. p. 261); repairs $3,487.87, (R. p. 262); hauling $7,131.34, (R. p. 263); tools and equipment $3,529.08, (R. p. 264); freight and express $184.18, (R. p. 264); insurance $653.24, (R. p. 265); traveling expense, $140.00, (R. p. 265); expense of Thomas Eline $719.07, (R. p. 266); expense of Toole, $310.96, (R. p. 267); telephone and telegraph $127.92, (R. p. 268); board and labors, $90.72, (R. p. 269); employment agents, $5.80, (R. p. 269); miscellaneous $198.39, (R. p. 270).

The checks were offered in evidence in bundles in accordance with the above subdivisions. Some of the checks were from the Home Office, some from the office of Crichton, and some from records kept on the job. (R. p. 271).

Toole had personal knowledge of his own expense account, a large portion of which had nothing to do with the cost of construction of the road (R. p. 272). Other-

wise, except for a few scattering items he had no personal knowledge of any of the checks or items (R. pp. 272-276).

The only foundation for the checks was as follows, (R. pp. 260-271):

"Q. Now, have you the checks with you from which you have made that audit covering those items?

A. Yes, sir.

Q. Will you hand them to me, please?

(Witness complies.)

Q. Referring to Exhibit 49, you may state what that is?

A. That is a bundle of checks issued on the job, the C. H. Windsor job, in payment of labor and services bills.

Q. And does the amount of those checks which you have in your possession, defendant's exhibit 49, as audited by you, total or compute the same amount to which you have just testified?

A. Yes, sir.

MR. MELRIN: We offer in evidence defendant's Exhibit 49."

The exhibits were introduced under objection.

Crichton on being recalled gave further testimony as follows: (R. pp. 279-281):

That exhibit 60 was given for telephone and telegrams; that he assisted Toole in making the audit and went over the various checks. That the checks, Exhibits 49-63 were paid by the Federal Surety Company. That he was instructed to take out insurance.

No books or records, other than the bundles of checks were even offered in evidence. The checks were not identified by any person who testified as to their correctness

or genuineness, or had any personal knowledge of the transactions. Toole merely used them with other records in making his audit in which he was assisted by Crichton. Under such circumstances there was, of course, no foundation for the admission of the checks.

Pabst Brewing Co. v. Horst Co., 229 Fed. 913;
Meredith v. Roman, 49 Mont. 204;
State v. Yegen, 74 Mont. 126;
State v. Asal, 256 Pac. 1071;
Wasley v. Dryden, 66 Mont. 17;
Gallatin Alliance v. Flannery, 59 Mont. 534;
22 C. J. 864 et seq;
Phillips v. United States, 201 Fed. 259.

With no foundation for the checks and with no other records even offered in evidence, Toole's audit is the only thing remaining in the record upon which appellant can base its claim that the evidence shows that it paid out more than the penalty of the bond. Appellant claims that proper foundation was laid for such evidence under R. C. M., 1921, Section 10516, subd. 5.

Section 10516 provides:

"There can be no evidence of the contents of a writing, other than the writing itself, except in the following cases:

5. When the original consists of numerous accounts or other documents, which cannot be examined in court without great loss of time, *and the evidence sought from them is only the general result of the whole.*"

In Silver v. Eakins, 55 Mont. 210, the court said:

"In so far as it was sought to show general results merely—for instance, the balance deducible from computation—the witness was properly permitted to state what was shown by the ledger."

The person testifying was the cashier of a bank under whose supervision the books were kept.

In Globe Mfg. Co. v. Harvey, (Cal.) 196 Pac. 261, the summary was made by defendant himself from the original bills, of which defendant had personal knowledge, and defendant could testify as to their correctness, which he did of his own knowledge.

In McPherson v. Great Western Milling Co. (Cal.) 186 Pac. 803, the books were in the possession of the opposing party and appellant had it in its power to show any error.

In the present case the opposite is true. The books and records were all in the possession of appellant. It could produce them or not as it desired. Toole, who testified as to the accounts, had little or no personal knowledge of the transaction or the records. He could not be cross-examined as to their genuineness or correctness. No witness available to appellees knew anything about the matter.

The rule in this respect seems to be as set out in 22 C. J. 1017:

> "Where the results of voluminous facts contained in writings, or of the examination of many books and papers or records, are to be proved, and the necessary examination of this documentary evidence cannot be satisfactorily made in court, it may be made by an expert accountant or other competent person, and the results thereof may be proved by him, *if the books, papers, or records themselves are properly in evidence, or their absence satisfactorily explained.*"

See also:

> Pabst Brewing Co. v. Horst Co., (Cal.) 229 Fed. 913, 918.

Furthermore, a great deal in addition to mere general results was in question here.

In its answer appellant alleged (R. pp. 39, 50) that the

money was expended by it in the construction of the road, and that such expenditure represented the reasonable and market value, and that the items were necessarily incurred. There is no evidence that such was the fact. Toole, a mere auditor, could not so testify even under the statute. Crichton, the only other person testifying, did not identify a single check as being a necessary or reasonable expenditure, or that the checks and records audited by Toole represented payments for construction of the project or were reasonable or necessary.

Under no conceivable set of circumstances can it be said that a proper foundation was laid for either the checks or for Toole's testimony. The District Court acted properly in disregarding it. Without it appellant is admittedly without basis for this appeal.

Since the whole contention made by appellant was that the expenditures made by it were necessary and reasonable, appellees had the right to meet that issue with evidence as to what the project should have reasonably cost. Powers was qualified to testify (R. pp. 281-283). His testimony as to the reasonable cost was competent.

22 C. J. 564.

The effect to be given his testimony was for the Court.

22 C. J. 728;

Solberg v. Sunburst Oil & G. Co., 246 Pac. 168;

Certainly appellees were not bound by evidence that appellant necessarily and reasonably expended a certain sum in completing the project.

What effect the court gave to this evidence is not apparent from its memorandum. Since it held that there was no foundation for the testimony of appellant, it probably disregarded it. In any event upon appellant's own

theory of the case such evidence was competent. Farther than that we need not go herein.

3. Conclusion.

By no method may appellant prevail herein. There is no foundation for the evidence which appellant admits is the basis of the appeal. Even assuming a foundation for such evidence appellant is bound by its contract with appellees, which they seek here to enforce and upon which judgment was rendered. Under such circumstances it is submitted that the judgment of the lower court must be affirmed.

Respectfully submitted,

HURD, HALL & McCABE,
H. C. HALL,
E. J. McCABE,
Attorneys for Appellees.

Service of the within brief and receipt of a copy thereof admitted this.....day of....., 1929.

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Attorneys for Appellant.